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No. 08-562

Supreme Court, U.S.
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In The

# Supreme Court of the United States

WILLIAM MALIHA,

*Petitioner,*

v.

FRANK FALUOTICO and SARA G. MALIHA,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## COUNTERSTATEMENT OF FACTS

Petitioner's statement of facts contains a number of misrepresentations and material omissions. Although petitioner claims that he was punched and grabbed by his wife on June 19, 2002, he omits the fact that, prior to his wife's alleged actions, petitioner lunged at his wife from across the room and grabbed a camera from her. Although petitioner acknowledges that he held his wife by her wrists and backed her across the kitchen, he omits the fact that he caused his wife's head to come into contact with the kitchen cabinets. Petitioner also omits the fact that, prior to fleeing the residence in fear, his wife told the parties' young daughter to call 911 and, after Mrs. Maliha had been released by petitioner and was able to retrieve the phone herself, petitioner grabbed the phone from her in order to prevent her from calling for help.

Upon leaving the residence, co-respondent Maliha went directly to a neighbor's house, where she called a domestic abuse hotline and, at the urging of the neighbor, called 911 and respondent Faluotico, a detective with the Ulster County Sheriff's Department and former neighbor and social acquaintance of the Malihas. Ulster County Sheriff's Deputy John Sperath responded to the 911 call from co-respondent Maliha. Mrs. Maliha told Sperath that petitioner "grabbed her by her wrists and pushed her into the kitchen cabinets". Mrs. Maliha also told Sperath that she fled the residence to her neighbor's house, and was afraid to go back. Mrs. Maliha also told Sperath

that petitioner had been "on edge" lately, that they had been having marital problems and that there were guns in the residence.

Petitioner's statement of facts is also inaccurate due to the fact that petitioner relies heavily and erroneously on transcripts of phone conversations that do not constitute proof in admissible form and, in any event, do not raise any question as to the existence of probable cause. If anything, the transcripts support the existence of probable cause in that they reflect Mrs. Maliha's fear of petitioner and the complaints made by her to the Sheriff's Department. Indeed, Deputy Sperath indicates in a phone call attributed to him that he was afraid to go to the Maliha home by himself based on the fear exhibited by Mrs. Maliha.

In any event, the purported transcripts should not be considered to the extent they contain inadmissible hearsay. Rather than deposing the witnesses regarding their alleged involvement, petitioner attempted to raise an issue of fact based on the non-party witnesses' hearsay statements and his own slanted and unsupported interpretation of said statements. Petitioner's version of what was said is not supported by the transcripts offered in opposition to the motion for summary judgment. For example, petitioner claims that Deputy Eric Benjamin can be heard on the tape disagreeing with having petitioner arrested. The transcripts submitted by petitioner reveal that Benjamin did not think Mrs. Maliha would fabricate what happened and that there were grounds for a mandatory arrest. Petitioner's

statement of facts is also misplaced in its reliance on the lack of any alleged "assault" or injury as indicating the lack of any basis for an arrest. Harassment in the second degree pursuant to New York Penal Law § 240.26(1) is committed when a person, with the intent to harass, annoy, threaten or alarm another person, strikes, shoves, kicks or otherwise subjects another person to physical contact. There is no requirement for an injury in order to have probable cause for an arrest for Harassment in the second degree in New York. Based on the undisputed facts of this case, including that petitioner lunged at his wife, grabbed a camera from her, pushed her across the kitchen while holding her arms, causing her head to come into contact with the cabinets and resulting in her fleeing the residence in fear, there can be no doubt that petitioner committed acts which provide probable cause for an arrest for Harassment in the second degree.

Finally, while petitioner relies on the dismissal of the criminal charge against him, he omits the fact that Family Court had concurrent jurisdiction over the Harassment charge (*see*, New York Family Court Act § 812(1) ["The family court and criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute . . . harassment in the second degree . . . "]) and that Family Court only dismissed the charge in the interest of justice, after it determined, based on the parties' testimony, that petitioner committed acts which constituted Harassment in the second degree. In any event, it is well settled that a determination of probable

cause is not dependent on the ultimate outcome of the charges, but instead is based on the reasonable conclusion to be drawn from the facts known by the officer at the time of the incident. In this case, probable cause to arrest exists as reflected in the initial report by Mrs. Maliha to Deputy Sperath (prior to any involvement by Faluotico) that petitioner "grabbed her by her wrists and pushed her into the kitchen cabinets", that she fled the residence to her neighbor's house, was afraid to go back, that petitioner had been "on edge" lately, that they had been having marital problems and that there were guns in the residence. As the determination that probable cause existed as a matter of law is supported by the facts and relevant authority, it is submitted that the petition seeking certiorari should be denied.

## REASONS FOR REFUSING THE PETITION

### A. SUBJECTIVE INTENT IS IRRELEVANT IN A DETERMINATION OF THE EXISTENCE OF PROBABLE CAUSE FOR AN ARREST

In support of the petition for certiorari, petitioner acknowledges that this Court has repeatedly held that subjective intent is irrelevant where there is an objectively reasonable basis for an arrest, but argue that this Court has not ruled on whether an alleged hostile and personal motive by the arresting officer that is allegedly unrelated to proper law enforcement objectives, can defeat the constitutionality of an allegedly dubious arrest (*see*, Petition, at 15). Petitioner's

argument should be rejected because it is based on the faulty premise that there was no basis for an arrest until after Faluotico became involved. The description of the incident by Mrs. Maliha to Deputy Sperath upon Sperath's arrival at the Liffman home in response to the 911 call fully supports the arrest for Harassment in the second degree. Mrs. Maliha told Deputy Sperath that petitioner "grabbed her by her wrists and pushed her into the kitchen cabinets". Mrs. Maliha also told Sperath that she fled the residence to her neighbor's house, and was afraid to go back. Mrs. Maliha also told Sperath that petitioner had been "on edge" lately, that they had been having marital problems and that there were guns in the residence. Based on the initial report, no reasonable juror could conclude that probable cause for the arrest was lacking.

The inquiry into probable cause is objective and the subjective beliefs or *motivations* of the arresting officer are irrelevant (*see*, *Devenpeck v. Alford*, 543 U.S. 146, 125 S.Ct. 588, 593-594, 160 L.Ed.2d 537 (2004); *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)). This Court reaffirmed in *Devenpeck* that "an arresting officer's state of mind (except for the facts he knows) is irrelevant to the existence of probable cause" (*Devenpeck*, 543 U.S., at 153, 125 S.Ct., at 593). *Devenpeck* squarely rejects petitioner's reliance on the alleged subjective motivations of Faluotico in determining the existence of probable cause, holding that "subjective intent of the arresting officer . . . is simply no basis for invalidating

an arrest" (*id.*, at 543 U.S., at 154, 125 S.Ct., at 594). Petitioner offers no authority for the claim that claimed motivations of Faluotico may be relevant. Furthermore, the claim that the alleged misrepresentations of Faluotico fabricated probable cause where none existed otherwise is not supported by the factual record.

It should also be noted that, even if it is assumed for the purpose of argument that petitioner was able to raise an issue of fact as to probable cause, dismissal would nonetheless have been warranted on the basis of qualified immunity. Faluotico requested qualified immunity in his original motion for summary judgment and preserved the issue for review by offering it as an alternative basis for affirmation on appeal. As the District Court and the Second Circuit determined that there was probable cause as a matter of law, there was never any need to determine the existence of arguable probable cause so as to support qualified immunity. In the context of petitioner's current arguments for certiorari, it should be noted that this Court has held that "an allegation of malice is not sufficient to defeat immunity if the respondent acted in an objectively reasonable manner" (*Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986), *citing Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

## B. SUMMARY JUDGMENT WAS PROPERLY GRANTED

Petitioner argues that the Courts below improperly intruded on the role of the fact-finder in awarding summary judgment (*see* Petition, at 17). Contrary to petitioner's argument, the decisions granting summary judgment and dismissing the complaint were properly based on the undisputed facts in the case. These undisputed facts include that petitioner grabbed a camera from his wife, held her by her wrists while he pushed her backwards, causing her head to come into contact with the kitchen cabinets, and thereafter prevented her from calling 911, resulting in her fleeing the residence in fear and calling a domestic abuse hotline and 911. These undisputed facts are sufficient to support the finding of probable cause. The alleged reasonable inferences relied on by petitioner are irrelevant to an objective determination of probable cause. As such, there is no basis for petitioner's request that this Court grant a writ of certiorari.

## CONCLUSION

Respondent Frank Faluotico respectfully requests that this Court deny petitioner's request for a writ of certiorari.

Dated: November 24, 2008

Respectfully submitted,

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